

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

77-2089

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
JOSEPH WILSON,

Petitioner-Appellant,

-against-

WALTER FOGG, Superintendent, Green :
Haven Correctional Facility, :

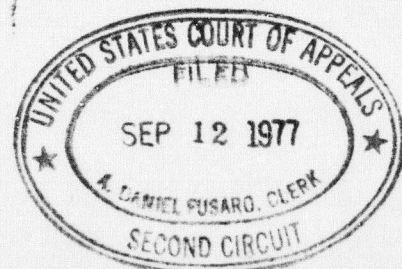
Respondent-Appellee. :
-----x

DOCKET NUMBER 77-2089

APPENDIX

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Dated: New York, New York
September 12, 1977



PAGINATION AS IN ORIGINAL COPY

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* The complete volume of minutes is in the office of
counsel for petitioner-appellant.

I. DISTRICT COURT DOCKET SHEET

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PLAINTIFFS

JOHN WILSON

DEFENDANTS OWEN, J.

WALTER FOGG, SUPERINTENDENT,
GREEN HAVEN CORRECTIONAL FACILITY,

JUL.

CAUSE

HADEAS CORPUS

ATTORNEYS

EMERSON'S LEGAL SERVICES OF N.Y.C.
100 CHURCH STREET,
N.Y.C. N.Y. 10007
285- 0370

77-2089



A

CHECK HERE IF CASE WAS FILED IN FORMA PENDING	DATE	FILING FEES PAID		C.D. NUMBER	STATISTICAL CARDS	
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JOSEPH WILSON, VS. WALTER FOLEY, ETC,

JUDGE OWEN

Pg. 2.

PROCEEDINGS

- 12-1-76 1. Filed Petition for Writ of Habeas Corpus.
- 12-21-76 2. Filed Petitioners memorandum of law in support of petition for writ of Habeas Co
- 12-21-76 3. Filed Order permitting the pliff to proceed in forma pauperis, Carter, J.
- 12-29-76 4. Filed memo end. on motion dated 12-21-76 Respondent is ordered to show cause w
the writ of habeas corpus should not be granted. Respondent's return is to be ma
on or before January 11, 1977. Owen J.
- 1-3-77 5. Filed affidavit of service of petition of habeas corpus by L. Myles on 12-21-76
- 31-77 6. Filed memo to law in opposition to petitioners application for Writ of Habeas
Corpus.
- 2-2-77 7. Filed stip and order extending time to file response to 1-31-77. Owen J.
- 6-2-77 8. Filed affdvt. of Alice Edelman dated 5-24-77, court reporter in.
Cr. Pt. 49 in Supreme Court of NYS County.
- 6-17-77 9. Filed affidavit of Theodore Custer.
- 6-17-77 10. Filed affidavit of Diane Quartlebaum.
- 17-77 11. Filed affidavit of L. Infeld.
- 6-21-77 12. Filed memo and order... petitioner knew of his trial and deliberately endeavored
to frustrate its commencement... and voluntarily waived his 6th and 14th amendment
rights to be rpresent at his trial. Petition dismissed. So ordered Owen J. m/n
to U.S.C.A.
- 8-1-77 13. Filed petitioner's notice of appeal from the order and judgment rendered on June 17
dismissing the petition for a writ of habeas corpus. Copy mailed to Mark Rutzick, B
- 7-11-77 14. Filed order granting certificate of probable cause. Owen J.
- 8-11-77 15. Filed Petitioners Notice of Motion & supporting affdvt. for an order
to delete from record on appeal a document not made part of the
record in District Court.....Ret. 8-22-77
- 8-11-77 16. Filed Petitioners Memorandum of law in support of motion to delete.
- 8-18-77 17. Filed Respondent's Affidavit of Kevin J. McKay's opposition to
Petitioner's Motion to delete part of the Record on Appeal to Del
Ethelaffidavit of Alice Edelman from the record on appeal.
- 8-18-77 18. Filed Memorandum of Law in opposition to petitioner's Motion to dele
part of the record on appeal.
- 8-19-77 --. Filed Memo End. on document #15, motion granted.....Owen, J. m/n
- 2-8-77 19. Filed Petitioner's reply memorandum.

A TRUE COPY
RAYMOND D. BURCHARDT, Clerk

By *[Signature]*
Deputy Clerk

II. MEMORANDUM AND ORDER OF DISTRICT COURT
(Owen, J.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSEPH WILSON,

Petitioner,

76 Civ. 5713

-against-

WALTER FOGG, Superintendent,
Green Haven Correctional Facility,

Respondent.

MEMORANDUM AND ORDER

OWEN, District Judge

This habeas corpus petition raises two questions:

(1) did the petitioner, an incarcerated defendant, voluntarily absent himself from his trial knowing it was to start on December 7, 1972, and (2) did the trial judge have a duty to have petitioner brought physically into the courtroom and in his presence place on the record the fact that the case was going to trial, in order to conclude that petitioner had waived his right to be present throughout the trial. (1)

(1)

Petitioner also urges that in any event he was denied due process of law because the trial judge failed to hold a hearing to determine whether he was competent to stand trial or competent to waive his right to be present throughout trial and confront the witnesses against him. There is no merit to that claim on the record before me. "[I]t is only where the evidence before the court provides a 'reasonable ground' for believing that [a defendant] is incompetent that the court should order an examination" United States ex rel. Roth v. Zelker, 455 F.2d 1105, 1108 (2d Cir. 1972). Here, there was no evidence before the trial court of a past history of mental disturbance and the trial judge concluded as do I from the record that petitioner was attempting to disrupt the judicial process by his succession of acts.

Joseph Wilson, true name Howard Burton, was indicted by a New York State grand jury for burglary and robbery involving his conduct breaking into the apartment of a 67 year old woman, who testified at the trial that he raped her as well. (2) Mr. Wilson was not a new face to the law, having had three prior convictions, various other arrests, a history of the use of false names, and had served time in such places as Attica State Prison.

The court record reveals that as the trial on his indictment neared, petitioner began what, in the context of the complete record, can only be regarded as an attempt at disrupting the processes of justice, by one means or another. The first occurrence was some time prior to November 2, 1972, when petitioner moved to relieve his then attorney, Milton Adler, Esq., of the Legal Aid Society, an experienced trial lawyer, when Mr. Adler announced to the Court that he was ready to try the case. A new lawyer from the Appellate Division panel was appointed to defend petitioner, one Alexander Dreiband, Esq.

On November 2, 1972, Mr. Dreiband requested and

(2)

According to the District Attorney, the charge of rape was not levelled as well because there was no corroboration.

received a month's adjournment to prepare the case. When the District Attorney moved the case for trial on December 4, 1972, according to him, "the defendant started carrying on," and petitioner's own lawyer acknowledged three days later, the day the trial started:

"[T]he last time we were in court [three days ago] he [petitioner] vented his anger upon Mr. Justice Warner and upon the court attendants. His scene in the courtroom was one where when the court attendant put his hand on his arm he started to scream and yell, 'Don't you touch me.' This was in the courtroom. As a result of which Mr. Justice Warner got up and walked out of the courtroom while they were returning the defendant to his cell."

The case was scheduled for trial on December 7, 1972, before Mr. Justice Spector, who was sitting in the New York City Civil Court Building.⁽³⁾ The first recorded minutes for proceedings that day read as follows:

MR. HELLER [Assistant District Attorney]: Justice Spector, pursuant to your instructions⁽⁴⁾ Mr. Dreiband, myself, the Clerk of the Court and the stenographer went to the Manhattan House of Detention at 125 White Street [across the street] about a half hour ago to see the defendant in this case, Joseph Wilson, who still refuses

(3)

That building has no segregated corridors for moving prisoners and necessitates moving all persons to and from courtrooms in the public corridors.

(4)

Unfortunately, those instructions appear to be unrecorded as are the pretrial proceedings on Nov. 2, Dec. 4, Dec. 6 and Dec. 7, prior to the suppression hearing.

to come to court. According to my Correction captain, Wilson refuses to come downstairs to the conference room to speak with us, and refuses to see anyone connected with this case.

We have two alternatives in this case, either to try him in absentia or for your Honor to sign an order to produce him using reasonable and necessary force to bring him into the courtroom. I think if we do nothing and just adjourn the case it would set a very dangerous precedent in this county and perhaps in other counties with other prisoners.

Thereupon, petitioner's counsel suggested to the Court that his client was not in possession of his faculties and urged the Court to determine whether there should be a mental examination. Justice Spector ultimately rejected the suggestion, but the response of the Assistant District Attorney to the Court's invitation for comment is illuminative on the question that is before me:

MR. HELLER: No, judge. I think this is -- we are dealing with a malingerer here, with a man who is always lucid in court. He was represented by Milton Adler. When Mr. Adler said that he was ready to try the case he moved to relieve Mr. Adler and have Appellate Division attorney assigned. The last time the case was on on November 2nd, before Justice Silverman, Mr. Dreiband was there and Mr. Dreiband requested a month's adjournment to properly prepare the case. At that time the defendant was perfectly lucid in court. As soon as I moved the case for trial on December 4th the defendant started carrying on. I think this is just an attempt to avoid what

to him would be a very unpleasant experience, being tried for this particularly vicious and heinous crime. I think he is a malingerer and I think we should proceed.

Petitioner's counsel did not disagree with any of the foregoing statements by the Assistant District Attorney, except as to whether petitioner and counsel had been in court together on November 2, 1972.

The colloquy thereafter between the Court and all counsel went on as follows:

THE COURT [to petitioner's lawyer]: Well, he would not consult with you this morning or with the assistant d.a.

MR. DREIBAND: Well, he wouldn't come downstairs. I didn't go up and I didn't appear to see him as counsel, but the warden, the assistant warden, went upstairs and he told the assistant warden it was his holiday, and he wouldn't come down.

Is that correct?

MR. HELLER: Yes. He told him he refuses to speak with anyone.

MR. DREIBAND: But he also mentioned something.

MR. HELLER: About his holiday.

MR. DREIBAND: At least that is what the warden stated.

MR. HELLER: In response to that as to whether or not it's his religious holiday, I yesterday subpoenaed the pedigree sheet of the defendant when

he was originally incarcerated on this charge in the Manhattan House of Detention. At that time he gave his religion as Protestant. I understand he now claims that he is now a Muslim and it's his holiday. I don't know of any holiday that is today or yesterday or the day before.

THE COURT: They told me yesterday that it was Chanukah and that it was his holiday. I am quite observant myself, and I don't know of anybody, Jew or otherwise, who doesn't work during the Chanukah festival.

MR. DREIBAND: The fact that we are here today --

THE COURT: I think that this defendant has an opportunity to come in to court to try his case. He was notified this morning that the district attorney and his counsel were present, they wanted to discuss his appearance in court today and informed him that the judge had instructed them that he appear in court today, and he has chosen not to appear. So, I think we will proceed without him.

A suppression hearing followed and, after recess, in the afternoon, the jury was selected by counsel in the absence of petitioner. At the close of the selection, the Court ruled:

THE COURT: The defendant will be directed to show up here tomorrow morning. The defendant will be directed to show up here tomorrow morning at 10:00 o'clock.

The record of the next morning reveals the following:

MR. DREIBAND: May I for the record state, your Honor, that the defendant has come to court this morning without

any difficulty. That I spoke with him and that he has advised me that he wants me to continue trying the case in his behalf, although he had previously instructed me not to.

THE COURT: Well, we are very happy to have you here, sir, and the defendant here.

MR. DREIBAND: Yes, so am I.

Your Honor, I just went upstairs with the attendants in court and advised the defendant that under the rules and regulations of the Correction Department he had to be handcuffed to be brought down to court. I would [not] use the language he used but he said it is in violation of his constitutional rights, he refuses to be handcuffed to be brought to court and the last remark he made as I walked away was, "You are not my lawyer any more."

Now I will be guided by what your Honor directs me to do.

THE COURT: Well, I direct that we proceed without him, since he has been invited to come here and he chooses not to. We can't change the rules and regulations of the Correction Department to suit him. We will proceed with the trial.

Petitioner remained absent throughout the trial and was found guilty by the jury as charged. After trial, but before sentence, Mr. Dreiband died. At sentence on March 15, 1973, petitioner was represented by new assigned counsel, Mr. Geller. Geller advised the court that petitioner told him that his relationship with Dreiband had been a poor one and that Dreiband had not told him, petitioner, that there

was a trial or that it would proceed without him. Geller asked that a hearing be held on the question of waiver of the right to be present at trial and the Court denied the application with the words, "Your client is not only a burglar and a thief, but he's a liar." The Court then reviewed the prior proceedings. Justice Spector stated, inter alia, "[P]etitioner was advised of every proceeding and every move made in this trial," and observed that petitioner had refused to attend the sentencing when it was scheduled a few weeks earlier and that he had "directed the Department of Correction to use whatever force is necessary, whatever means was necessary to bring him to court." Petitioner, through Geller, denied all knowledge that a trial was in progress and particularly that Dreiband or any assistant district attorney so informed him, and prior to imposition of sentence himself stated, "As far as Mr. Dreiband telling me about a hearing and a trial, that's incorrect." Justice Spector subsequently sentenced petitioner to concurrent terms of 5 to 15 years and 2 1/3 to 7 years.

Petitioner now seeks his release pursuant to 28 U.S.C. § 2254, claiming that he did not waive his sixth and fourteenth amendment rights to attend his trial and confront the witnesses against him.

A defendant can waive his constitutional right to be

present at trial. An effective waiver can occur when a defendant not in custody voluntarily absents himself during trial, e.g., Taylor v. United States, 414 U.S. 17 (1973) (per curiam), and even when a defendant who has entered a plea and has been advised when proceedings were to take place does not appear at the designated time, e.g., United States v. Pastor, Dkt. Nos. 76-1364 & 1423, slip. op. 3633 (2d Cir. May 19, 1977); United States v. Tortora, 464 F.2d 1202 (2d Cir.), cert. denied, 409 U.S. 1063 (1972). Furthermore, the right of a defendant to be present at every stage of the trial can be lost by an accused "who engages in speech and conduct which is so noisy, disorderly, and disruptive that it is exceedingly difficult or wholly impossible to carry on the trial." Illinois v. Allen, 397 U.S. 337, 338, 343-46 (1970).

The question here is whether petitioner's failure to be present at all during the trial resulted from a "knowing" and "voluntary" waiver of his constitutional right to be present throughout his trial. United States v. Tortora, 464 F.2d at 1208. The principal rule is that "courts must indulge every reasonable presumption against the loss of constitutional right." Illinois v. Allen, 397 U.S. at 343, citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938). However, there is no question here but that petitioner's failure to

attend his trial was the result of his deliberate decision not to appear despite continued orders and invitations by the Court. Therefore, his absence was voluntary. United States v. Tortora, 464 F.2d at 1208. As for the question of whether petitioner had knowledge of the impending trial, "[t]he events of [December 7] must be appraised in the revealing light of what went on before and after that date." United States v. Pastor, slip op. at 3647.

From the minutes of the various proceedings that are available, what clearly emerges is the picture of a "street-wise" individual who in a misguided but ultimately ineffective way, endeavored to avoid the inexorable day of reckoning. His comments, such as "[y]ou are not my lawyer anymore," coupled with his refusal to come to court himself, obviously showed a belief on his part that if he did not have a lawyer and was not present, then the case could not be tried. His outbursts, three days before the beginning of the trial, viewed against earlier days of appropriate decorum, showed a willingness to use disruptive tactics to cause judicial concern as to his very presence in the courtroom and how to guard him and maintain general decorum, with the hope of gaining the advantage of time and delay.

I have no question from the record that petitioner knew with clarity the increasing imminence of his trial for

he discharged his first lawyer when that lawyer was ready for trial, and on December 4 began the disruptive tactic requiring his removal from the courtroom when the Assistant District Attorney in his presence moved the case for trial. This was but three days prior to its actual commencement. He refused to come to the courtroom the day of the suppression hearing and the beginning of the trial although ordered to do so by the judge, told his lawyer to continue the trial the following day, although remaining absent, later countermanding that to discharge his lawyer. He was incarcerated as a Protestant, subsequently claimed he was a Muslim, but asserted that the reason he would not come to court on December 7, the first day of his trial, was that it was his holiday, Chanukah.

Petitioner argues that Justice Spector was under a duty to have him physically present in the courtroom to inform him on the record that the case was going to trial before the Court could conclude that he had waived his sixth and fourteenth amendment right to be present throughout his trial and confront the witnesses against him.⁽⁵⁾ While I

⁽⁵⁾ Petitioner seeks support in the following dictum in United States v. Tortora, a case in which a defendant in a multiple-defendant case jumped bail and failed to appear for trial for that reason: "It is difficult for us to conceive of any case where the exercise of this discretion [to try defendant in absentia] would be appropriate in other than a multiple-defendant case." 464 F.2d at 1210 n.7.

What the dictum recognizes is that even a fugitive's

agree with petitioner to the extent that it would have been the preferred course for the trial judge to take, see People v. Epps, 37 N.Y.2d 343, 350-51, cert. denied, 423 U.S. 999 (1975), and would certainly have obviated the need for the detailed analysis of the record here required, the law only requires that "[i]t must clearly appear in the record . . . that the defendant was advised when proceedings were to commence and that he voluntarily, knowingly, and without justification failed to be present" United States v. Tortora, 464 F.2d at 1209. Nor is there a prohibition against considering all the circumstances revealed by the record for proof of the fact that petitioner knew

(5) (continued)

interest in his constitutional right to be present at trial and confront the witnesses against him is of sufficient magnitude to require that, absent special circumstances outweighing that interest, which probably do not exist in single-defendant cases, it should be preserved to him until such time as he is no longer a fugitive. The dictum also recognizes that there may be extraordinary circumstances where "the public interest clearly outweighs that of the voluntarily absent defendant." Id. at 1210.

In this case, however, where the defendant is already in custody, this consideration obviously does not apply. Were that the rule here, a singly-indicted defendant, absent the use of force against him, would have absolute control over the scheduling of his own trial, and "[n]o defendant has the unilateral right to set the time or circumstances under which he will be tried." Id. at 1208. The sixth and fourteenth amendments do not require that a defendant be present at trial, only that he have the right to be present. Taylor v. United States, 414 U.S. at 20.

the trial was scheduled for a day certain, and from those it is clear that petitioner knew that December 7 was the date for trial.

The minutes reveal that in the petitioner's presence the Assistant District Attorney moved the case for trial on December 4, which is the day petitioner "vented his anger upon Mr. Justice Warner and upon the court attendants" with his screaming and yelling. It is equally clear that the defendant was ordered to come to court the morning of his trial and refused to do so, telling the assistant warden it was "his holiday" and he would not come down.⁽⁶⁾

The following day, petitioner's own lawyer reported to Justice Spector that petitioner had come to court that morning without difficulty and that he had spoken with petitioner who "advised me that he wants me to continue trying the case in his behalf" (emphasis supplied). The clear import of this statement is not only that Mr. Dreiband was to

(6)

Although petitioner's reported response to the Court's direction to attend is hearsay -- being the out-of-court statement of the assistant warden [a responsible prison official] to defense counsel and the assistant district attorney -- that statement has sufficient indicia of reliability since petitioner's attorney was both present at the time the statement was made and present to defend his client's interests in the event there was an inaccuracy in reporting the statement to the Court.

continue with the trial as defendant's lawyer⁽⁷⁾ but, assuming (as one is entitled to assume from a representation to the Court by a client's own lawyer) that the conversation was accurately reported by his lawyer, petitioner, by asking his lawyer to "continue trying" the case, was expressing an awareness of the fact that it was his trial that was under way with Mr. Dreiband trying it for him. Thus, Justice Spector was clearly entitled to reject petitioner's statement made at the time of sentence that: "As far as Mr. Dreiband telling me about a hearing and a trial, that's incorrect. I know nothing about it." As the majority wrote in United States v. Pastor:

"The decision as to whether the defendant's voluntary absence from the trial amounts to a waiver is thus vested in the sound discretion of the trial judge, who is usually in a superior position to evaluate the evidence, including witnesses' credibility, because of familiarity with the background and circumstances." Slip op. at 3638.

Obviously, a court cannot allow a defendant by disruption or evasive conduct to dictate the date or circumstances under which a trial will take place, particularly in

⁽⁷⁾ Although this was revoked shortly thereafter. See p.7 supra.

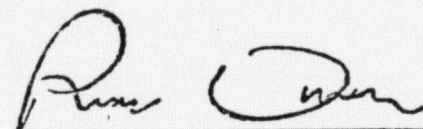
this time of crowded metropolitan dockets and the difficulties of rescheduling police and lay witnesses and keeping them available in the face of delays. Moreover, when a defendant, as his own lawyer admits, has been disruptive before another judge three days before trial, requiring removal from the courtroom, a trial judge is not required. In my opinion, to ^{forcibly} bring a defendant through public corridors of litigants and lawyers for the sole purpose of putting on the record the defendant's statement of position out of his own mouth when his position is perfectly clear from everything else in the record, including his own statements to a responsible correction officer.

Given all of the foregoing, I conclude that the record adequately reveals that petitioner knew of his trial, deliberately endeavored to frustrate its commencement and continuation and consequently knowingly and voluntarily waived his sixth and fourteenth amendment rights to be present throughout his trial.

The petition is dismissed.

So ordered.

June 17, 1977.


United States District Judge

III. MINUTES OF PRE-TRIAL HEARING IN NEW YORK COUNTY
SUPREME COURT, DECEMBER 7, 1972, pp. 1 - 8.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : CRIMINAL PART 49

- - - - - X

THE PEOPLE OF THE STATE OF NEW YORK, :

Complainant, : IND. NO. 4461/72

- against - :

JOSEPH WILSON, true name HOWARD :

BURTON, :

Defendant. :

- - - - - X

111 Centre Street,
New York, N. Y. 10013,
December 7, 1972.

WADE HEARING

B E F O R E :

HON. MORRIS SPECTOR, Justice.

APPEARANCES:

For the People:

HON. FRANK S. HOGAN,
District Attorney, New York County,

BY: DONALD H. HELLER, A.D.A.

For the Defendant:

ALEXANDER DREIBAND, ESQ.

ALICE EDELMAN
Official Court Reporter

P R O C E E D I N G S

MR. HELLER: Justice Spector, pursuant to your instructions Mr. Dreiband, myself, the Clerk of the Court and the stenographer went to the Manhattan House of Detention at 125 White Street about a half hour ago to see the defendant in this case, Joseph Wilson, who still refuses to come to court. According to my Correction captain, Wilson refuses to come downstairs to the conference room to speak with us, and refuses to see anyone connected with this case.

We have two alternatives in this case, either to try him in absentia or for your Honor to sign an order to produce him using reasonable and necessary force to bring him into the courtroom. I think if we do nothing and just adjourn the case it would set a very dangerous precedent in this county and perhaps in other counties with other prisoners. I leave the alternatives up to you, but I think your Honor would have authority to do either in good conscience.

MR. DREIBAND: If the Court pleases, I am fast coming to the conclusion that perhaps what we need here is an examination in Bellevue of this defendant. I can't understand how a man can continue to act the

way this man has unless there is something wrong with him.

Now, to try him in absentia, of course that is your Honor's prerogative, but without exhausting the possibility, this man may be sick, I don't think that would be the right thing to do, and I urge your Honor that possibly to send him to Bellevue.

THE COURT: Do you base that upon any reason except for the fact that he refuses to attend?

MR. DREIBAND: Well, I stated to your Honor yesterday at the bench, which is not on the record, if your Honor would want me to put it on the record now I will.

THE COURT: Go ahead.

MR. DREIBAND: This defendant has threatened me. He directed me to file writs for six incarcerated prisoners at the Tombs, telling me that they know where I live and unless I do it I better watch out. That is one thing.

Secondly, he has told me he is God, and he is acting right now as if he really thinks he is God.

I understand from the assistant district attorney that on a prior occasion he tried his own case and he has already informed me that he doesn't

want me to try his case, he will try it himself, he will be counsel on the trial. Now, this is not the conduct or activity of a man who, in my opinion, has all of his faculties.

I haven't discussed with him the possibility of his being examined. He refused to come down today. But, I leave it to your Honor to determine what should be done.

THE COURT: Have you ever discussed with him the possibility of having a mental examination?

MR. DREIBAND: No, I have not.

THE COURT: Does the district attorney think that we ought to send this man to Bellevue?

MR. HELLER: No, judge. I think this is -- we are dealing with a malingerer here, with a man who is always lucid in court. He was represented by Milton Adler. When Mr. Adler said that he was ready to try the case he moved to relieve Mr. Adler and have Appellate Division attorney assigned. The last time the case was on on November 2nd, before Justice Silverman, Mr. Dreiband was there and Mr. Dreiband requested a month's adjournment to properly prepare the case. At that time the defendant was perfectly lucid in court. As soon as I moved the

case for trial on December 4th the defendant started carrying on. I think this is just an attempt to avoid what to him would be a very unpleasant experience, being tried for this particularly vicious and heinous crime. I think he is a malingerer and I think we should proceed. I don't think it is necessary to have a psychiatrist look at this man. He has absolutely no psychiatric history at all and the -- his crime is not the crime of an insane man and his actions with the police are not the acts of an insane man.

MR. DREIBAND: The only thing --

THE COURT: Well, what is he charged with, burglary in the second degree?

MR. HELLER: Burglary in the second degree and robbery in the second degree.

MR. DREIBAND: The only thing I disagree with the assistant d.a. is that I was only in court on one occasion with this defendant having not been assigned by the Appellate Division until sometime at the end of October.

MR. HELLER: You were in court on November 2nd.

MR. DREIBAND: Yes, but he wasn't produced at that time.

MR. HELLER: Yes, he was.

MR. DREIBAND: I had no conversation with him at that time, that's for sure. The only conversation I had with him was the last time we were in court and at that time he vented his anger upon Mr. Justice Warner and upon the court attendants. His scene in the courtroom was one where when the court attendant put his hand on his arm he started to scream and yell, "Don't you touch me." This was in the courtroom. As a result of which Mr. Justice Warner got up and walked out of the courtroom while they were returning the defendant to his cell. That is all I can tell you.

THE COURT: Well, he would not consult with you this morning or with the assistant d.a.

MR. DREIBAND: Well, he wouldn't come downstairs. I didn't go up and I didn't appear to see him as counsel, but the warden, the assistant warden, went upstairs and he told the assistant warden it was his holiday, and he wouldn't come down.

Is that correct?

MR. HELLER: Yes. He told him he refuses to speak with anyone.

MR. DREIBAND: But he also mentioned something.

MR. HELLER: About his holiday.

MR. DREIBAND: At least that is what the warden stated.

MR. HELLER: In response to that as to whether or not it's his religious holiday, I yesterday subpoenaed the pedigree sheet of the defendant when he was originally incarcerated on this charge in the Manhattan House of Detention. At that time he gave his religion as Protestant. I understand he now claims that he is now a Muslim and it's his holiday. I don't know of any holiday that is today or yesterday or the day before.

THE COURT: They told me yesterday that it was Chanukah and that it was his holiday. I am quite observant myself, and I don't know of anybody, Jew or otherwise, who doesn't work during the Chanukah festival.

MR. DREIBAND: The fact that we are here today --

THE COURT: I think that this defendant has an opportunity to come in to court to try his case. He was notified this morning that the district attorney and his counsel were present, they wanted to discuss

his appearance in court today and informed him that the judge had instructed them that he appear in court today, and he has chosen not to appear. So, I think we will proceed without him.

MR. DREIBAND: Well then, your Honor, we have the motion to suppress before the actual selection of the jury.

THE COURT: All right.

Are you prepared to proceed with that?

MR. HELLER: Yes.

Now, Mr. Dreiband, I understand, has adopted the motion of Mr. Adler and Mr. Wilson's prior attorney; am I correct?

MR. DREIBAND: That's right, sir. The motions were made before I came into the case and I have adopted them.

MR. HELLER: Now, this motion, as your Honor I am sure is fully familiar with the law in regard to whether or not we should have a pre-trial identification hearing, pre-trial identification hearing as required by our 730.10 of the Criminal Procedure Law requires that a motion be supported by an affidavit alleging such facts to require a hearing. Now, in this affidavit by Mr. Adler he

IV. MINUTES OF TRIAL IN NEW YORK COUNTY SUPREME COURT,
DECEMBER 7 and 8, 1972, pp. 1-11.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : CRIMINAL PART 49

----- X

THE PEOPLE OF THE STATE OF NEW YORK, :

Complainant, : IND. NO. 4461/72

- against - :

JOSEPH WILSON, true name HOWARD :
BURTON, :

Defendant. :

----- X

111 Centre Street,
New York, N. Y. 10013,
December 7, 1972 et seq.

T R I A L

B E F O R E :

HON. MORRIS SPECTOR, Justice.

APPEARANCES:

For the People:

HON. FRANK S. HOGAN,
District Attorney, New York County,

By: DONALD H. HELLER, A.D.A.

For the Defendant:

ALEXANDER DREIBAND, ESQ.

ALICE EDELMAN
Official Court Reporter

(Court reconvened at 3:12 P.M.)

COURT CLERK: People of the State of New York
against Joseph Wilson.

MR. DREIBAND: If the Court please, I move to
strike out the second count of the indictment
because it is not correct as a matter of law.

MR. HELLER: I have no objection to striking
it out.

THE COURT: Strike it out. The second count
is dismissed.

MR. HELLER: And renumber the third count now
the second count. That will make it just a two-
count indictment.

THE COURT: Any objection to that, counselor?

MR. DREIBAND: No, your Honor.

THE COURT: All right, motion is granted.

MR. HELLER: Thank you, your Honor.

MR. DREIBAND: May I approach the bench?

THE COURT: Yes, sir.

MR. DREIBAND: I just wanted to call your
Honor's attention to my commitment with Judge Sil-
verman tomorrow morning, that I wouldn't be here
until 11:00 o'clock.

THE COURT: As late as that?

MR. DREIBAND: Well, I want to be safe and I don't want you to have these delays, judge, and I have to walk from 60 Centre Street over here.

THE COURT: All right.

MR. DREIBAND: Thank you.

(Whereupon, a panel of jurors filed into the courtroom.)

COURT CLERK: Trial calendar, People of the State of New York Vs. Joseph Wilson, true name Howard Burton.

MR. HELLER: If your Honor pleases, in the name of the People of the State of New York, I move the case against Joseph Wilson, true name Howard Burton, Indictment 4461/1972, for trial. The charge is burglary in the second degree.

MR. DREIBAND: All I can say is the defendant is ready under the circumstances your Honor is aware of.

THE COURT: Well, we have it on the record why he is not present.

COURT CLERK: Shall I swear the prospective jurors, sir?

THE COURT: Yes.

(Whereupon, the panel of prospective jurors

was duly sworn.)

THE COURT: Mr. District Attorney, will you step up a moment, please.

(Whereupon, Mr. Heller approached the bench.)

THE COURT: Before we select the members of the jury I would like the panel to know that the defendant is not present. Of course, he has a right to be present, but he chose not to be present. So, you don't see him sitting here, and I want you to know that this is his counsel here and not the defendant.

MR. DREIBAND: Thank you, your Honor.

(Whereupon, the jury box was filled and a voir dire was conducted by Mr. Heller on behalf of the People.)

PROSPECTIVE JUROR NO. 8: Why isn't he present, are we allowed to know?

MR. DREIBAND: What is that?

THE COURT: He wants to know why he is not present.

He chose not to be here.

(Whereupon, the voir dire examination was resumed by Mr. Heller)

(Whereupon, a voir dire examination was

conducted by Mr. Dreiband on behalf of the defendant.)

(Six jurors having been sworn, Mr. Heller resumed the voir dire examination.)

MR. HELLER: No challenges for cause.

(Whereupon, Mr. Dreiband resumed the voir dire examination.)

MR. DREIBAND: No challenge for cause.

(Whereupon, four more jurors were duly sworn.)

(Whereupon, the jury box was filled.)

(Whereupon, Mr. Heller resumed the voir dire examination.)

MR. HELLER: No challenges for cause.

(Whereupon, Mr. Dreiband resumed the voir dire examination.)

MR. DREIBAND: I challenge for cause.

THE COURT: Challenged. Very good, sir.

COURT CLERK: Jack S. Hill, challenge for cause sustained.

(Whereupon, Mr. Dreiband resumed the voir dire examination.)

MR. DREIBAND: No challenge for cause.

(Whereupon, one juror was duly sworn)

(Whereupon, the jury box was filled.)

(Whereupon, the voir dire examination was resumed by Mr. Heller.)

MR. HELLER: No challenge for cause.

(Whereupon, the voir dire examination was resumed by Mr. Dreiband.)

MR. DREIBAND: No challenge for cause.

MR. HELLER: Jury satisfactory to the People.

MR. DREIBAND: May I just have a moment, your Honor, on that?

THE COURT: Yes.

MR. DREIBAND: May I ask one more question, your Honor?

(Whereupon, the voir dire examination was resumed by Mr. Dreiband.)

MR. DREIBAND: Juror satisfactory, your Honor.

THE COURT: Swear the juror.

(Whereupon, one additional juror was duly sworn.)

THE COURT: Please, call two names to serve as alternate jurors.

(Whereupon, the box was filled and a voir dire examination was conducted by Mr. Heller.)

MR. HELLER: Jurors are satisfactory to the

People. No challenge for cause.

(Whereupon, a voir dire examination of the prospective alternates was conducted by Mr. Dreiband.)

MR. DREIBAND: No challenge for cause.

MR. HELLER: Satisfactory.

MR. DREIBAND: Satisfactory to the defendant.

(Whereupon, two alternate jurors were duly sworn.)

THE COURT: Mr. Foreman, gentlemen of the jury, I just want to give you some admonitions before we adjourn.

First of all, I want to tell you that you know nothing about the case, so it would be silly to talk about it because you have not even heard the opening statements by counsel. It is a criminal case. Jurors must be very circumspect, must not consult with others about the case. As a matter of fact, you must not consult amongst yourselves or discuss the case amongst yourselves until you are actually gone into the jury room to start your deliberations. Do not discuss it with members of your family or with friends, certainly not with any strangers or anybody connected with the case.

Do not read any accounts of this in the newspapers, in case there are some, or listen to the news media in case there are any events reported in the news media about the case. Do not let anybody talk to you about the case. If they do, report that to the Court forthwith, even another juror.

You may not visit or view the premises or the place where the offense was allegedly committed.

This Court will adjourn until 10:00 o'clock tomorrow morning.

MR. DREIBAND: Excuse me, your Honor, are you going to bring the jury in at 10:00?

THE COURT: I will have some matters to take care of tomorrow morning and counsel has a prior engagement, so he doesn't think he will be able to get here until 10:30. I am going to let the jury go until 10:30 tomorrow. I have had very poor experience with telling jurors they may report back at 10:30 or 11:00 the next day, knowing full well that I couldn't possibly handle their case at that time. It seems that the more rein you give, the more they take. Of course, our time is very valuable, but instead of telling you to come here at 10:00 and keep you waiting, get here at 10:30, please, every one

of you.

You are all excused until 10:30 tomorrow morning. You must report back to this juryroom, you don't have to go to the Central Jury Part at all. The court officer will instruct you on that.

(Whereupon, the jury filed out of the courtroom.)

THE COURT: The defendant will be directed to show up here tomorrow morning. The defendant will be directed to show up here tomorrow morning at 10:00 o'clock.

MR. HELLER: Could the defendant be informed by someone that the case is actually on trial, that the trial will proceed.

MR. DREIBAND: By whom? I wouldn't want --

THE COURT: No, he is directed to come here.

MR. DREIBAND: That is the Court's order. He will become more stubborn if somebody tells him what to do and won't come at all.

(Whereupon, at 5:32 P.M., the trial was ~~ended~~, adjourned to Friday, December 8, 1972, at 10:30 A.M.)

* * * * *

111 Centre Street,
New York, N. Y. 10013,
December 8, 1972.

(Peo. V. Joseph Wilson, T/N Howard Burton)

(Indictment No. 4461/72)

(Same appearances)

(Trial continued)

B E F O R E :

HON. MORRIS SPECTOR, Justice.

* * * * *

(The judge was on the bench; the assistant district attorney and defense counsel were present. Both the defendant and the jury were absent. Court was convened at 11:05 A.M.)

MR. DREIBAND: May I for the record state, your Honor, that the defendant has come to court this morning without any difficulty. That I spoke with him and that he has advised me that he wants me to continue trying the case in his behalf, although he had previously instructed me not to.

THE COURT: Well, we are very happy to have you here, sir, and the defendant here.

MR. DREIBAND: Yes, so am I.

Your Honor, I just went upstairs with the attendants in court and advised the defendant that under the rules and regulations of the Correction Department he had to be handcuffed to be brought

down to court. I would use the language he used but he said that it is in violation of his constitutional rights, he refuses to be handcuffed to be brought to court and the last remark he made as I walked away was, "You are not my lawyer any more."

Now I will be guided by what your Honor directs me to do.

THE COURT: Well, I direct that we proceed without him, since he has been invited to come here and he chooses not to. We can't change the rules and regulations of the Correction Department to suit him. We will proceed with the trial.

MR. HELLER: Judge, I am going to use a photograph then for the identification in court, and this photograph I have has a B.C.I. number and date of arrest of a prior case because he refused to be photographed in this case. So, in order to avoid any prejudice to the defendant, I request that the Court Clerk clip off the B.C.I. number and clip -- as a matter of fact, I will do it. I think I know exactly.

MR. DREIBAND: Of course, I will object to that.

THE COURT: You may have an objection. Over-

V. MINUTES OF SENTENCE IN NEW YORK COUNTY SUPREME COURT,
MARCH 15, 1973, pp. 1 - 19.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 52

-----x

THE PEOPLE OF THE STATE OF NEW YORK :

-against- :

JOSEPH WILSON,
T/N HOWARD BURTON,

Indictment No.

: 4461-72

: SENTENCE

Defendant.

-----x

100 Centre Street
New York, N. Y.
March 15, 1973

B e f o r e :

HON. MORRIS E. SPECTOR,

Justice.

Appearances:

For the People: DONALD H. HELLER, ESQ.,
Assistant District Attorney.

For the Defendant: Messrs. RUBIN, GOLD and GELLER,
By: ALVIN GELLER, ESQ.,
of Counsel.

Murray Deutsch, C.S.R.,
Court Reporter.

Sentence

THE CLERK: Page one, line nine. Joseph Wilson, true name Howard Burton.

(Mr. Heller, Mr. Geller and the defendant are present.)

MR. GELLER: Good afternoon, your Honor.

We have been assigned by the Appellate Division to -- I have been assigned by the Appellate Division to represent the defendant.

Alvin Geller, 299 Broadway, New York, New York.

THE CLERK: Joseph Wilson, true name Howard Burton, you are being arraigned at this time on your conviction by verdict in absentia to the crime of burglary in the second degree, the first count of indictment 4461 of 1972, and the crime of robbery in the third degree, the second count of indictment 4461 of 1972.

Prior to the imposition of sentence you personally may address the Court; your counsel may address the Court; you each may address the Court.

MR. GELLER: Your Honor, the defendant is not ready for sentence. I've conferred at length with Mr. Wilson for approximately an

Sentence

hour and a half the day before yesterday in the Tombs.

The defendant's position, your Honor, is that he was never tried, that he's never had the benefit of a trial before a judge or a trial before a judge and a jury.

The defendant advises me at no time did the witnesses testify against him in any proceeding in the Supreme Court~~x~~ of the State of New York.

And the defendant's feeling is, your Honor, that he is not the man who should be sentenced in this case, that he has not had the benefit of a trial. And it's the defendant's application that this sentence not go ahead, or in the alternative, that your Honor is sentencing the wrong man.

MR. HELLER: May I be heard, your Honor, in respect to that, Mr. Geller's statement?

I think the record is abundantly clear at the time of trial, pre-trial proceeding, Mr. Justice Ivan Warner directed the case to your Honor's attention from Part 40 for a trial. The defendant voluntarily and knowingly refused

Sentence

to leave his cell at Manhattan House of Detention, and appear before your Honor in Part 49 at 111 Centre Street. When he finally did come across the street he refused to leave the detention pen in handcuffs.

The record is clear, we've had testimony of the deceased -- his deceased attorney at the time of his refusal to leave the cell, that he was informed of the trial, and of the consequences of his failing to appear.

I think this man is a very shrewd man, and I think this is a game, and I would urge your Honor to pay no attention to it. Your Honor gave it careful consideration at the time of trial and your Honor properly proceeded with the trial.

MR. GELLER: May I briefly answer that, your Honor?

THE COURT: Yes.

MR. GELLER: Your Honor, Mr. Wilson advised me that his relationship with Mr. Dreiband, the deceased attorney, was a very poor one. They did not communicate, they did not discuss the case. I asked Mr. Wilson specifically,

Sentence

"Did your lawyer tell you that you were going to trial, ~~xxx~~ that there was a trial in progress, and that a trial would proceed in your absence?"

Mr. Wilson advised me he had no such knowledge. And when I came, your Honor, to tell him that I was assigned to represent him for sentence, he expressed great shock. He has no recollection of a trial, nor does he have a recollection that any attorney, Mr. Dreiband or any Legal Aid lawyer, told him that a trial was in progress.

Now, the only thing I could suggest, I certainly don't question anything that Mr. Heller says, your Honor, because I was not in the case, but perhaps your Honor would set this case down for a hearing to determine whether or not Mr. Wilson waived the very fundamental right to be present before his very own trial. And I think certainly the Constitution guarantees him that right. And I think the burden would be on the People and the ~~x~~prosecution to show that Mr. Wilson waived his right and that Mr. Wilson was aware of a trial, and what approach and what attitude he adopted. And I ask your

Sentence

Honor to direct that such a hearing occur prior to sentence in this case.

THE COURT: Your application is denied.

The Court~~x~~ is ready for sentence.

Your client is not only a burglar and a thief, but he's a liar. Because he had been treated with kid gloves in this proceeding.

Mr. Dreiband, who was a very able lawyer and respected member of this Bar, protected each and every Constitutional right of this defendant, and was humiliated because this defendant wouldn't pay any attention to him. And Mr. Dreiband was over to the prison at the Tombs to see him, and Mr. Dreiband saw him in the jail or in the van downstairs, in the courtroom at 111 Centre Street. He was advised of every proceeding and every move made in this trial.

I was cognizant that he refused to attend the hearing. He was invited to attend, but he refused to attend. And the Court had to use discreet language in addressing the jury in answering why this man was not present at the trial.

Sentence

As far as this man being the wrong man being sentenced, I'm sentencing a man by the name of Howard Barton, alias Joseph Wilson, who has been duly processed by the Police Department and who has been indicted by the Grand Jury of New York County.

He had the opportunity to attend the trial.

He --

MR. GELLER: Your Honor -- I'm sorry. Go ahead.

THE COURT: He gave various reasons why he didn't want to attend the trial.

The first time he didn't want to attend the trial was because it was Chanukah, the Jewish holiday, and he was celebrating it.

Well, I'm an observant Jew, but I didn't find it against my religion to appear in court and work on Chanukah.

The second time he refused to attend the trial when he saw that we were proceeding without him and the jury had been selected, he then deigned to come over from the Tombs to 111 Centre Street, and because the Department of Corrections insisted that he be haddcuffed

Sentence

cavorting from the street floor up to the tenth floor, or wherever the courtroom was located, he refused to come up in handcuffs. So we proceeded without him.

And when this case was on for sentence a couple of weeks ago he refused to attend the sentence. And I directed the Department of Correction to use whatever force is necessary, whatever means was necessary to bring him to court.

We didn't just order a verdict against him. He had a full trial, ably represented by able counsel. Witnesses testified against him, and the jury chose to believe those witnesses.

MR. GELLER: May I --

THE COURT: He had communication with his counsel.

As a matter of fact, the assistant went down with his counsel to instruct him about the proceedings.

We've had enough of his nonsense.

MR. GELLER: Your Honor bear with me for one minute while I just ask one or two questions.

(Whereupon, Mr. Geller confers with the

Sentence

defendant, off the record.)

MR. GELLER: Your Honor, just so the record is clear and my client's position and appellate rights are protected, he categorically denies, Judge, that Mr. Dreiband ever told him the trial was in progress; he denies that any assistant D.A. told him the trial was in progress. His position is he had no knowledge that a trial was in progress. And once again he asks your Honor to direct a hearing to determine whether this occurred.

Your Honor's information must be hearsay, in that somebody told you that the lawyer spoke to MR. Burton or Mr. Wilson.

THE COURT: His lawyer told me that he spoke to him.

MR. GELLER: Well, that, your Honor --

THE COURT: His lawyer was appointed by the Court. He was appointed --

MR. GELLER: I understand.

THE COURT: He was appointed by the Court because the Court had full confidence in him and respected him and respected his ability.

MR. GELDER: I appreciate that, your Honor.

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Sentence

Mr. Wilson denies that.

THE COURT: That is all right.

MR. HELLER: Judge, if I may just add one thing.

THE COURT: Yes, sir.

MR. HELLER: I went across the street from 111 Centre Street to the Manhattan House of Detention with Mr. Dreiband and our court reporter. Mr. Wilson, or Mr. Burton, whichever name he prefers, refused to speak with us, and he communicated through a correction officer, who we know will testify -- and your Honor ruled that a hearing is not necessary -- that Mr. Wilson refused to come to court, refused to speak to us concerning the case. And Mr. Dreiband at the time prior had told Mr. Wilson about the impending trial, and in fact the trial had already ~~was~~ begun, I think the record --

THE COURT: And didn't you go downstairs with Mr. Dreiband the following day?

MR. HELLER: No, no. The court officer in that part did go with him, as I recall.

MR. GELLER: You see, your Honor, there could be some confusion.

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Sentence

THE COURT: There is no confusion. The Court is not confused.

MR. GELLER: Well, your Honor, if what Mr. Heller says is true, I mean, all I'm asking is --

THE COURT: Well, I'm not wasting any more time, counselor. I'm prepared for sentence.

If there is anything you want to say in behalf of your client, this is the time to say it.

MR. GELLER: Surely, your Honor.

THE CLERK: May I have a moment, please? I have to finish arraigning him prior to the imposition of sentence.

You personally have a right to address the Court, your counsel has a right to address the Court. Each of you have a right to address the Court.

THE DEFENDANT: I will address the Court.

THE CLERK: Just one moment, please.

Does the district attorney wish to be heard?

MR. HELLER: Yes, we do.

If your Honor pleases, I in my five years

Sentence

connection with the District Attorney's office, & I've handled many, many serious cases. This is one of the most serious cases I've ever handled. This defendant is one of the most vicious, contemptible creatures that walk the streets of our town.

He was duly tried by a jury of his peers.

This defendant forcibly broke into the apartment of a sixty-seven year old woman. In the apartment, as your Honor recalls vividly, this lovely woman testified that this defendant forcibly raped her. Unfortunately the evidence of corroboration was lacking. And for that reason only that charge was not included in the indictment.

The defendant was convicted of burglary in the second degree and force -- and robbery in the third degree by force.

He has a record dating back to 1962 for felonious assault. He has a burglary in 1963 which he did eight months on for unlawful entry. He had a burglary in 1965 which was a felony conviction, and he served time at Attica State Prison. He has a criminal

Sentence

trespass and burglary in 1969, the disposition of that I'm not familiar with.

But again, his ^{record} ~~report~~ is replete with false names and burglary arrests and convictions.

This defendant must be isolated from society for as long as possible. There's no chance ^{to} ~~for~~ rehabilitate him. He has shown utter contempt for the Court and for the legal process in our community.

He was apprehended minutes after this vicious, contemptible crime.

I would strongly urge your Honor, as to the first count, burglary in the second degree, to sentence the defendant to an indeterminate term of fifteen years, with a minimum term of five years.

And as to the robbery in the third degree count and conviction, to an indeterminate term of seven years, with a minimum sentence of two and a third years, both sentences to run consecutively, and hopefully we will keep him away from the decent people that walk the streets of our town and live in our community.

MR. GELLER: Your Honor, may the defendant

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Sentence

address the Court?

THE COURT: Yes, sir.

THE DEFENDANT: Number one, your Honor, the accusations are false. I'm a married man, my wife is nineteen years old.

As far as Mr. Dreiband telling me about a hearing and a trial, that's incorrect. I know nothing about it. I think I have a right to a jury trial, I'd like to have a hearing, and I'd like to be given my just~~i~~ right, and another if you don't give it to me/~~the~~ court will. But this is a civilized society, supposedly, and I'm asking for justice.

MR. GELLER: Your Honor, I hope your Honor is not unduly swayed by Mr. Heller's most inflammatory and in my opinion unlawyer-like remarks on sentence. I don't think I've heard a D.A. talk that way in five years.

In any event, your Honor, Mr. Heller alluded to the criminal record of Mr. Wilson, your Honor, and I suggest to the Court that the Court is experienced in criminal cases, that it's not a very bad record, your Honor.

He was arrested in 1964, and my indication

Sentence

is that he was acquitted, and Mr. Heller indicated that that was the first in a series of serious cases. My record shows that he was acquitted, and that was the disposition on December 26th of 1962.

He pled guilty in 1963, and I think he received eight months on a misdemeanor conviction. And he does have, as Mr. Heller said, a felony conviction in 1965 for burglary.

Judge, he was arrested in 1970 for trespass, and although Mr. Heller said he didn't know the disposition, my clerk tells me that that case was dismissed.

So it turns out, your Honor, that --

THE COURT: In '69 when?

MR. GELLER: IN 1970, your Honor. November 12th of 1970 --

THE COURT: He was given ninety days on May 7th, 1969, for criminal trespass in the third degree.

MR. GELLER: Yes, your Honor. That's right. That is correct. But the one in '70 was dismissed, at least according to the information I have.

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Sentence

THE COURT: That's right.

MR. GELELR: And I think that brings us to the instance case, unless I'm wrong.

So that would show, your Honor, that ~~ah~~ he has a felony conviction and two misdemeanor convictions. And frankly, no history of violence and no history of assault or rapes or sexual crimes. And I would suggest to the Court that considering the many, many defendants that come through our system, that this is not a bad record. It's not a good record, but it's not a heinous record with rapes and other types of crime.

Your Honor, the defendant has been convicted, your Honor has made that finding. The defendant, of course --

THE COURT: I didn't make the finding, the jury made the finding.

MR. GELLER: Well, your Honor has made a finding that a jury convicted this defendant. He denies that, but your Honor has already ruled on that.

I would suggest to the Court that in dealing with this case, I don't think your Honor

Sentence

has the power to impose consecutive sentences, because basically we're in a situation where one transaction led to the commission of several crimes, as proved by the prosecution. And I think the law in this state is that where one act leads to several crimes such as a burglary or petty larceny, that where one crime stems from the same ~~xxx~~ acts, that the Court must impose a concurrent sentence rather than consecutive sentences. And I would ask your Honor to be as lenient as you can, and in the imposition of sentence to impose concurrent sentences and not consecutive sentences.

THE COURT: Howard Burton, alias Joseph Wilson --

MR. GELLER: Your Honor, I hate to interrupt the Court. The defendant may have a point. Just before your Honor imposes sentence, may I --

THE COURT: Yes, you may confer with him.

(Mr. Geller confers with the defendant, off the record.)

MR. GELLER: Your Honor, the defendant wants it crystal clear, and I know your Honor

Sentence

understands it, but for the benefit of my client, he wants it crystal clear that in his opinion your Honor lacks the power to sentence him because he did not appear before a jury, nor did he have the benefit of a trial.

I say that so my client hears me, and he knows it's on the record, Judge.

THE COURT: Very well.

Howard Burton, alias Joseph Wilson, upon your conviction for the crime of burglary in the second degree, a class E felony, I sentence you to a term of imprisonment, the minimum of which shall be five years, and the maximum of which shall be fifteen years.

And upon your conviction of the crime of robbery in the third degree, a class D felony, I sentence you to a term of imprisonment, the minimum of which shall be two and a third years and the maximum of which shall be seven years.

The sentences are to run concurrently, and it is directed that you be placed in the custody of the New York State Department of Correction, to be dealt with according to law.

I am imposing a minimum sentence in each

Sentence

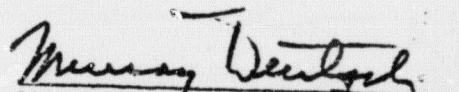
instance because of the nature of the crime and the defendant's previous record indicates to the Court that the defendant should be imprisoned for a substantial period of time prior to the meeting of the Parole Board.

THE CLERK: Joseph Wilson, true name Harold Burton, you are advised of your right to appeal from the judgment just imposed. You may do so by filing a notice of appeal with the Clerk of the Court within thirty days.

(Mr. Geller confers with the defendant, off the record.)

- - -

I HEREBY CERTIFY the foregoing to be a true and accurate transcript of the minutes taken by me in this proceeding.


Murray Deutsch, C.S.R.,
Official Reporter.

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RECEIVED
DEPARTMENT OF LAW

NEW YORK CITY OFFICE
ATTORNEY GENERAL

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DEPARTMENT OF LAW

SEP 12 1977

NEW YORK CITY OFFICE

ATTORNEY GENERAL

Paul S. LeBourdier
Br